STATE OF MICHIGAN

COURT OF APPEALS

CHARTER ONE BANK NA, f/k/a CHARTER ONE BANK FSB,

Plaintiff-Appellant,

v

JP MORGAN CHASE BANK NA, f/k/a BANK ONE, f/k/a NBD BANK NA,

Defendant-Appellee.

UNPUBLISHED
April 2, 2009

No. 281439
Ingham Circuit Court
LC No. 06-000985-CZ

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the decision of the circuit court denying its motion for summary disposition and granting summary disposition in favor of defendant. Because defendant's advance was not a future advance under the Future Advance Mortgage Act (FAMA), MCL 565.901, *et seq.*, we affirm.

Paul and Sheryl Benson, who are not parties to this litigation, were the owners of Okemos Builders, a construction company. The Bensons maintained a line of credit with defendant for their business from about 1991 through 2003. In June 1992, defendant loaned Okemos Builders $60,000.00, which the Bensons secured with a mortgage on their personal residence. Defendant promptly recorded the mortgage. The Bensons also granted defendant a continuing guaranty in support of Okemos Builders' credit line, which was also secured by the June 1992 mortgage. By August 1998, defendant had increased Okemos Builders' credit line to $200,000.00.

In December 1993, plaintiff loaned the Benson's $68,900, which the Benson's secured with a mortgage on their home. Plaintiff recorded this mortgage. The Benson's defaulted on both plaintiff and defendant's loans and both parties foreclosed upon the loans, plaintiff having foreclosed on its loan in June, 2003 and defendant having foreclosed on its loan in July, 2003. At defendant's foreclosure sale, defendant bid $155,358.73, the amount defendant contends represented the amount of debt it was owed. Plaintiff thereafter initiated this action, asserting that it was the owner of the property at the time of defendant's foreclosure sale and that defendant was only entitled to recover the initial $60,000.00 loan through the foreclosure sale. Accordingly, plaintiff contended it was entitled to the surplus proceeds from the foreclosure sale, i.e., the amount in excess of $60,000.00.

Plaintiff argued before the circuit court that summary disposition in its favor was appropriate because defendant, the first mortgagee, did not comply with the FAMA in issuing advances under its mortgage. Plaintiff argued that defendant was required to state in "conspicuous" language, either "in a different print or larger print," that it was issuing a future advance mortgage. Moreover, plaintiff argued that defendant's failure to comply with FAMA meant that the case was controlled by the common law, "[s]o, instead of any advances relating back to the original date of the mortgage recording, they relate to the date that they are made." Plaintiff thus asserted that the issue in the case was "whether or not [defendant's] mortgage could only secure a maximum amount of $60,000.00." According to plaintiff, any amount above $60,000.00 that defendant loaned to the Bensons or their business was not secured by defendant's mortgage, and thus defendant's claim to any monies beyond the mortgage loan was subordinate to plaintiff's claim.

The circuit court disagreed, finding that case law supported defendant's argument that a mortgage could (and here, did) secure later, additional loans beyond the original amount of the mortgage loan. In support, the circuit court citied *Seiberling Tire & Rubber Co v State Bank of Fraser*, 78 Mich App 587; 261 NW2d 13 (1977) and *Holiday Inns, Inc v Susher-Schaefer Investment Co*, 77 Mich App 658; 259 NW2d 179 (1977). The circuit court stated that in *Seiberling*, on similar facts, this Court found that where a first mortgage was recorded and contained language securing all other debts, the second lender had constructive notice of the first mortgage and its terms and had a duty to ascertain its status prior to making its loan to the mortgagors. We agree.

In *Seiberling*, the defendant was the first mortgagee and initiated foreclosure upon the mortgagor's default. *Seiberling, supra* at 588. The defendant had originally loaned the mortgagors $106,000.00. *Id.* The mortgage instrument contained a future advances provision stating that the mortgage "secure[d] all other debts and loans . . . covering any borrowed money by the mortgagors . . . from the mortgagee for any purpose whatsoever." *Id.* The defendant later loaned the mortgagors $24,000.00, evidenced by a note bearing a handwritten notation that it was secured by the first mortgage. *Id.* at 588-589. Both of the defendant's loans were made and recorded prior to a mortgage executed by the mortgagors to the plaintiff to secure a $66,895.00 loan. *Id.* at 588-589.

The defendant in *Seiberling* was the sole bidder at the foreclosure sale and "bid the amount originally advanced under the first mortgage plus the subsequent loan, along with accrued interest and costs." *Id.* at 589. The plaintiff argued that there was a surplus from the sale to which it was entitled as the second mortgagee, but the Court disagreed, concluding that because the defendant's second loan had been secured by the first mortgage, it had priority over the plaintiff's mortgage; thus, "no surplus was created by the defendant's bid at foreclosure." *Id.* at 588-590. The Court also held that it was

> irrelevant to the priority determination that the note evidencing the second loan . . . contained the later notation that it was added to the first mortgage. It was the mortgage itself that was recorded, not any notes evidencing indebtedness. Plaintiff had constructive notice of the defendant's mortgage . . . at the time the second mortgage was consummated. It was incumbent upon plaintiff to ascertain the status of the prior encumbrance before making its loan to the mortgagors. [*Id.* at 590-591.]

Plaintiff in the instant case argues that *Seiberling* is not applicable due to inapposite facts. Plaintiff notes that in *Seiberling*, the advance at issue was made prior to the recording of the second mortgage, as opposed to the instant case where defendant's advance was made following the recording of plaintiff's second mortgage. Plaintiff also notes that the amount of the loans at issue in *Seiberling* did not exceed the amount of debt secured on the face of the original mortgage, while in the instant case defendant's $200,000.00 advance went beyond the $60,000.00 face value of the mortgage. Finally, plaintiff argues that the mortgage at issue in *Seiberling* was recorded prior to FAMA, and thus was not subject to the act. We do not find these arguments to be persuasive.

The Court in *Seiberling* stated expressly that the plaintiff had constructive notice of the defendant's mortgage, and therefore of its terms, including the future advance provision at the time that it made its second mortgage. *Id.* at 590-591. Thus, plaintiff's argument in the instant case that *Seiberling* is not applicable based on the timing of the advance versus the second mortgage lacks merit, as the *Seiberling* Court did not decide the case on this basis. Rather, the Court noted that it was not the timing of the advance, but rather the language contained in the mortgage document that should have alerted the plaintiff to ascertain the status of the mortgage and other potential indebtedness of the mortgagors.

Defendant has argued in the instant case that it did not issue an advance to the Bensons, but rather had a credit line with them that was secured by the mortgage and was gradually increased to $200,000.00. According to defendant, by the time plaintiff recorded its mortgage with the Bensons, "the actual amount of credit extended to [Okemos Builders] (and guarantied by the Bensons) had reached approximately $110,000.00." Thus, plaintiff had constructive notice under *Seiberling* that defendant's mortgage secured not only the $60,000.00 promissory note, but also the Bensons' personal guaranties which in turn secured a debt obligation to defendant that was considerably higher than the sum noted on the face of the mortgage document. Further, there is no indication in *Seiberling* that the Court's decision was influenced by the fact that the defendant's advance was for a lesser amount than the amount secured by the mortgage, and plaintiff does not explain why this is relevant, as any advance secured by a mortgage would increase the mortgagor's debt obligation to an amount above that shown on the face of the mortgage document. Thus, plaintiff's argument that a loan far in excess of the original mortgage loan cannot be secured by a future advance provision in a mortgage document lacks merit.

Plaintiff also argues that because FAMA was not in effect at the time that *Seiberling* was decided, the Court's decision in that case has no bearing on the instant case. Defendant argues that the credit line it extended to the Bensons was not a future advance, and thus was not subject to the act. MCL 565.901(a) defines a "future advance" as "an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee." A "future advance mortgage"

> means a mortgage that secures a future advance and is recorded either prior to or after the effective date of this act. If a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded. [MCL 565.901(b).]

By contrast, defendant characterizes the Bensons' additional debt obligations secured by the mortgage as credit debt issued pursuant to their personal guaranty, which was secured by the mortgage. Importantly, defendant contends that the mortgage was executed to secure two existing obligations: the original $60,000.00 promissory note and the continuing personal guaranty, which arose before the mortgage was recorded. Thus, defendant argues, the personal guaranty cannot be considered a future advance mortgage because it was an existing "other obligation" at the time the Bensons signed the mortgage. Defendant's argument that its credit line to Okemos Builders was not a future advance under the act is persuasive, as the credit line was secured by the Bensons' continuing personal guaranty which was an existing obligation at the time mortgage was recorded.

Plaintiff argues further that *Ladue v Detroit & M R Co*, 13 Mich 380 (1865) created a duty for defendant to ascertain the status of plaintiff's mortgage at the time it made its advance to the Bensons, and that the *Seiberling* Court misinterpreted *Ladue*. According to plaintiff, the Court in *Seiberling* cited *Ladue* for the proposition that a second mortgagee has the responsibility of ascertaining the status of the first mortgage prior to making its loan when it has constructive knowledge of the first mortgage. Plaintiff argues that, by contrast, our Supreme Court in *Ladue* held that it was the responsibility of the first mortgagee to ascertain the status of its own encumbrance prior to making a subsequent advance. Plaintiff's interpretation lacks merit.

In *Ladue*, John Ladue's firm executed a mortgage to the complainant which did not include any provision for moneys advanced to Ladue, and in fact made any "such advances and liabilities, if made or incurred, . . . purely optional on the part of the mortgagees." *Ladue, supra* at 391-392. Ladue later sold the mortgaged property to a third party. *Id.* at 392. The issue before our Supreme Court concerned endorsements made for Ladue by the mortgagees after the property sale and the recording of the deed by the third party. *Id.* The Court noted that "[t]he mortgagees, at the time of the indorsements [sic] in question, had no notice of the deed to [the third party purchaser], unless the record of that deed is to be considered such notice." *Id.*

The Court rejected the defendants' argument that because the mortgagor carried no debt at the time of the property sale or recording of the deed, "the mortgage was not then an incumbrance in fact or in legal effect . . . [and] could only become such from the time when the advances or indorsements were actually made." *Id*. at 393. The Court concluded that it was not the responsibility of the third party purchaser to give notice to the mortgagees that the property had been conveyed "so that they might not afterwards be led to incur further liabilities on the faith of the mortgagor," but rather the duty of the mortgagees "to look to the record before making any . . . advances, or indorsing paper for the mortgagor . . . as any new mortgagee would have had, and ought, therefore, to be governed by the same prudential considerations." *Id.* at 398-399. The Court concluded that the second mortgage issued by the mortgagee to Ladue should be considered subsequent to the deed, and that the registry of the deed should be considered notice to the mortgagees that the property had changed hands. *Id.* at 400.

Ladue is not particularly useful for purposes of this case. In the instant case, no third party purchased the mortgaged property prior to plaintiff's mortgage agreement with the Bensons or prior to defendant's extension of credit to the Bensons. Moreover, plaintiff's argument that defendant's mortgage document did not secure its future advances is not specifically addressed in *Ladue*. In addition, this point is neither central to the Court's holding in *Seiberling* nor does

the *Seiberling* Court rely on *Ladue* in reaching its conclusion that the plaintiff had constructive notice of the defendant's mortgage and of the advances made under that mortgage based on the language of the defendant's recorded mortgage instrument. See *Seiberling*, *supra* at 590-591. Thus, *Ladue* has little bearing on the instant case, as there is no evidence that the Court in *Seiberling* misinterpreted its statement regarding the duties of initial versus subsequent mortgagees, and the facts are not directly applicable.

Plaintiff also argues that a cross-collateralization provision in a mortgage cannot increase the amount of the total debt over the amount stated on the face of the mortgage document. However, plaintiff does not cite case or statutory law to support this argument, other than a reference to FAMA which, as previously discussed, does not apply to defendant's continuing personal guaranties with the Bensons or to its credit line with Okemos Builders. Without proper authority to support its argument, we consider this issue to have been abandoned by plaintiff on appeal. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Sevitto
/s/ Michael J. Kelly